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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 253

ALICE M. ANSON, ET AL.,
Petitioners,

vs.

HIRAM WALKER & SONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Dated July 18, 1955.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on April 29, 1955.

CITATION TO OPINION BELOW.

The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, p. 13, is reported in 222 F. 2d 100.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 29, 1955. (R. 63; p. 22, *infra*.) Rehearing was denied on May 17, 1955. (R. 72; p. 22, *infra*.) The

jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Was not the Court of Appeals in error in holding:

(a) that the Federal District Court does not have jurisdiction over the matters alleged in the amended complaint as exclusive jurisdiction over the same is vested in the National Labor Relations Board.

(b) that Congress has prescribed an exclusive remedy, under the Labor Management Relations Act, for the settlement of all labor disputes.

(c) that the designated Union is the exclusive representative of the employees on all matters growing out of employment.

(d) that under Illinois law, even if plaintiffs had alleged wrongful discharge, they must, before bringing suit, exhaust all the remedies provided in the collective bargaining agreement for the presentation of grievances.

(e) that the amended complaint does not sufficiently allege exhaustion of remedies provided in the collective bargaining agreement.

2. Does not the amended complaint state a cause of action, and in particular do not the allegations as to loss of seniority and employment, sufficiently allege breach of the collective bargaining agreement, and entitle the plaintiffs, citizens of Illinois, to bring suit in the District Court against the defendant, a Michigan corporation?

3. Is the breach of the collective bargaining agreement as alleged by plaintiffs necessarily an "unfair labor practice" so that jurisdiction is vested exclusively in the National Labor Relations Board?

4. Do not the facts alleged in the amended complaint

sufficiently present a justiciable controversy and thereby invoke the jurisdiction of the federal district court so that the case may be decided on its merits, and not on the pleadings?

5. If necessary should not the plaintiffs be given an opportunity to further amend their pleadings if the same are found to be lacking in some details?

STATEMENT.

Plaintiffs, all residents of the State of Illinois brought suit in their individual capacities in the federal district court at Peoria, Illinois, against their employer, Hiram Walker & Sons, Inc., a Michigan corporation, for breach of contract existing between each one and the defendant, which contract had been previously negotiated by the union. (R. 49, 51, 52.)

The amended complaint alleges that defendant operated a distillery at the foot of Edmund Street in Peoria and one located at the foot of Clarke Street in Peoria. In 1943 the question of seniority of the employees at the Clarke Street plant, as well as their union representation, arose and these employees selected as their bargaining agent the same union which had been and was representing the employees at the Edmund Street plant. (R. 49.)

The contract covering both plants which was entered into in 1943 and, except for minor changes not material, was in effect on May 5, 1952, provided that the Clarke Street employees were to have seniority from the time they became employees of defendant; that the three operating plants of defendant, Edmund Street, Clarke Street and Uptown Warehouse were to be separate bargaining units; and to insure the separate identity of the three job groups and preserve the seniority of each employee and to prevent "job-hopping", provided in paragraph 8 that there

would be no interchange of employees between the three operating bargaining units. (R. 49, 50.)

It is also alleged that in May of 1952 defendant devised a scheme to deprive the Clarke Street employees of their seniority and employment by consolidating all operations of Clarke Street with Edmund Street and thereby consolidating all the operations of the two plants under one roof. Defendant then announced to plaintiffs, employees at Clarke Street, that they no longer had any seniority and if they wanted to work it must be as new employees as to consolidate employees would be in violation of paragraph 8 of the collective bargaining agreement. (R. 50, 51.)

Plaintiffs state that consolidation of employees would not be an interchange of employees within the meaning of the contract but that consolidation of operations without consolidation of employees was in violation of the contract, and plaintiffs thereby lost their seniority which the contract was designed and intended to protect. (R. 51.)

The amended complaint further states that plaintiff employees pursued every means available to them according to the terms of the contract in regard to negotiation and arbitration concerning the breach of the contract by defendant, but to no avail, and defendant has refused to reinstate them to their seniority and reimburse them their losses, although they are ready, willing and able to work; and that as a result of defendant's illegal action each plaintiff has and will be damaged to the extent of $10,000.00 for which judgment was requested. (R. 52.)

The defendant filed a motion to dismiss the action upon the grounds that: (1) the amended complaint fails to state a cause of action; (2) the union is an indispensable party; (3) the suit is contrary to public policy in that

(a) if maintained will supersede the exclusive bargaining rights of the union, (b) cannot be voluntarily settled without the union and therefore in violation of Sec. 8 (b) of the Labor Management Relations Act, (c) cannot be compromised as union's exclusive bargaining rights could not be determined by decree of the court and (d) encourages similar suits; (4) suit does not present a justiciable controversy as plaintiffs did not exhaust their contract remedies before bringing suit; and (5) that it appears from the face of the amended complaint that the court has no jurisdiction of the subject matter in that no justiciable controversy is presented by reason of plaintiffs' failure to exhaust their contract remedies prior to bringing the action. (R. 43.)

The district court allowed the motion to dismiss and on appeal to the Court of Appeals for the Seventh Circuit, the judgment was affirmed upon the ground that exclusive jurisdiction over the matters alleged in the amended complaint is vested in the National Labor Relations Board. (Appendix A attached hereto.)

REASONS FOR GRANTING WRIT.

1. If the opinion of the Court of Appeals for the Seventh Circuit is allowed to stand it will be in conflict with the statements, reasoning and cases cited in the opinion of the Supreme Court of the United States in the case of *Ass'n. of Westinghouse S. Emp.* v. *Westinghouse E. Corporation*, ... U. S. ....., 75 S. Ct. 488. It is clear from reading the majority, concurring and dissenting opinions that the federal district courts in diversity cases such as we have here, are not ousted of jurisdiction to entertain suits by individual employees to enforce collective bargaining contracts. Mr. Justice Frankfurter stated at page 491, footnote 2:

"It is significant, however, that breach of contract is not an 'unfair labor practice'. A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once the parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board.' H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42."

and on page 500:

"When the employee and the union are in disagreement, the question is not which may sue, but rather the extent to which the one may conclude the other."

and

"The employees have always been able to enforce their individual rights in the state courts. They have not been hampered by the rules governing unincorporated associations. To this extent, the collective bargaining contract has always been 'enforceable'."

Mr. Chief Justice Warren said at page 501:

"For us the language of Sec. 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer."

Mr. Justice Reed stated at page 502:

"Since the contract entered into through provisions of the Labor Act creates rights over which Congress has legislative authority, a breach of the contract is likewise within its power. Congress by Sec. 301 has manifested its purpose to vest jurisdiction over breaches, to a certain extent, in the federal courts. Whether the rules of substantive law applied by the federal courts are derived from federal or state sources is immaterial. The rules are truly federal, not state.

> The cause of action for breach of contract is thus a cause af action arising under federal law, the source of federal judicial power under Art. III of the Constitution."

Mr. Justice Black stated at page 504:

> "It is plain, I think, that the grievance procedure is a part of the collective bargaining process. And a lawsuit is one of the ultimates of a grievance. A lawsuit, like negotiation or arbitration, resolves the dispute and settles it."

In this case we have diversity of citizenship and the required jurisdictional amount. The plaintiffs have alleged that defendant breached the collective bargaining agreement by depriving them of seniority through the process of consolidation of operations without consolidation of employees; and that such action upon the part of the defendant is not an interchange of employees within the meaning of the contract, thereby stating a cause of action and invoking the jurisdiction of the federal district court. Integration of employees is not the same as "interchange" of employees. Integration is the common and accepted method to protect and preserve seniority when railroads consolidate divisions or when two railroad companies merge. Integration of employees was approved in the case of *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263. That case involved the merger of two air carriers and the seniority rights of the employees of both companies were preserved by integration. The defendant here failing to integrate, breached the contract to the damage of the plaintiffs.

2. If the decision of the Court of Appeals rendered April 29, 1955 is allowed to stand, any and all breaches of the bargaining contract will constitute an "unfair labor practice" and give exclusive jurisdiction to the National Labor Relations Board. The decision will preempt any

State action on such matters. This in in conflict not only with the *Westinghouse* case, *supra*, but is in conflict with the case of *Weber* v. *Anheuser-Busch, Inc.* ..... U. S. ....., 75 S. Ct. 480.

Mr. Justice Frankfurter stated in the *Weber* case at page 487:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner* v. *Teamsters Union, supra.* But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S., at page 488, 74 S. Ct. at page 164. This penumbral area can be rendered progressively clear only by the course of litigation."

The Supreme Court should grant this writ to resolve this question as well as the other questions raised by the decision of the Court of Appeals.

3. If the decision of the Court of Appeals is not reversed an employee will not be entitled to bring suit for breach of a collective bargaining agreement in the federal or state courts of Illinois unless he (a) categorically alleges wrongful discharge and (b) alleges with minute particularity exhaustion of contract remedies prior to bringing suit.

The amended complaint alleges that because of the illegal action of the defendant, plaintiffs have lost their

seniority and employment. It is true that no where in the complaint is it stated that "defendant wrongfully discharged plaintiffs" but it is a very thinly drawn line between wrongful discharge and being placed at the bottom of the seniority roster, being treated as "new" employees and receiving little or no work. The facts alleged are sufficient to show such a "wrongful discharge" by defendant so as to entitle plaintiffs the right to seek redress in the federal district court. It is to be noted that in the plaintiffs' prayer for relief they request money damages for past and future wages or in the alternative they request in lieu of damages for future loss of wages a reinstatement of their seniority rights, together with damages for loss of past wages.

We believe that the decision of the Seventh Circuit in the case of *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997, supports plaintiff's assertion that the amended complaint states a cause of action. In the *Ford* case the action was brought in the District Court and was dismissed on motion. On appeal the decision was reversed and the Court of Appeals for the Seventh Circuit, at page 1002, held that the averments of the complaint that the employer had refused the union's request to use the grievance procedure provided by the contract and had refused the union's offer to exhaust all processes available under the agreement, to be sufficient as to exhaustion of contract remedies. The court also held that the plaintiffs need not do a useless thing.

In this case plaintiffs allege that they pursued every means available to them under the contract in regard to negotiation and arbitration concerning the breach of the contract but that the defendant ignored their complaints and requests. Under the *Ford* case these averments are sufficient and in addition these plaintiffs should not be required to do a useless thing.

In the *Ford* case the complaint of the individual employee was that he had been wrongfully discharged because of compulsory retirement. The court stated that under the contract an employee could only be discharged for cause and that compulsory retirement accomplishes the same result—the employment is terminated.

In this case the facts show that the defendant announced to plaintiffs that if they wanted to work it must be as new employees. In effect plaintiff's employment was terminated without just cause.

The Illinois cases cited in the opinion of the Court of Appeals at page 104 are not applicable to this case. With the exception of *Keel* v. *Illinois Terminal Railroad Co.*, 346 Ill. App. 169, 104 N. E. 659, the cases involve internal disputes between members of a union, churches, or other associations and not disputes between members and third parties. The substance of these cases is that the Illinois courts are reluctant to interfere with disciplinary powers of voluntary organizations over their members and interference will be justified only if their exercise is marked by gross injustice and unfairness. In this case we are not dealing with so-called union activities or minor grievances but are dealing with loss of livelihood for which the plaintiffs will have no redress unless the decision of the Court of Appeals is reversed. Admittedly the law in regard to railroad cases in Illinois and elsewhere requires that the employee, in order to bring suit in the courts, must treat his "wrongful discharge" as final, but if he maintains that his employment is continuing and insists upon reinstatement then the grievance procedure, including final disposition by the railroad board, is exclusive. Nowhere in the *Keel* case, *supra*, is it stated that if the railroad employee treats his discharge as final that he must allege exhaustion of contract remedies before bringing suit. In fact, the court in the *Keel* case reversed with leave to Plain-

tiff to amend so as to make it clearly an action for damages only.

It is the law of Illinois that individual employees can sue directly for breach of contract without making the union a party to the suit and without alleging in minute detail exhaustion of administrative remedies. *United Protective Workers of America* v. *Ford Motor Co.*, 194 Fed. 2d 997 (CA-7); *Dierschow* v. *West Suburban Dairies, Inc.*, 276 Ill. App. 355, 367; *Novosk* v. *Reznick*, 323 Ill. App. 514, 548, 56 N. E. 2d 318, 320; *Ledford* v. *Chicago, M. St. P. & P. R. Co.*, 298 Ill. App. 298, 312, 18 N. E. 2d 568, 573; *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473, 478, 480; *Steele* v. *Louisville and Nashville Ry.*, 323 U. S. 192, 65 S. Ct. 226; and Northwestern University Law Review, Vol. 50, No. 2, Page 158.

We believe the law of Illinois was correctly stated in the *Ford Motor Co.* case, wherein the court stated at page 1001:

> "The right of a member of a union who has been injured by a breach by his employer of the collective bargaining contract to sue to recover damages is recognized in Illinois (citing cases)."

and the petition for the writ should be granted.

4. It is also the law in Illinois that seniority is a valuable property right. *Ledford* v. *Chicago, M. St. P. & P. R. Co.*, 298 Ill. App. 298, 312, 18 N. E. 2d 568, 573. The plaintiffs allege loss of seniority and the consequent loss of employment. This right to work must be protected by the courts. If the decision of the Court of Appeals is not set aside, the preservation of this property right of highest value will be lost as there cannot be effective protection by the National Labor Relations Board. If the decision of Court of Appeals is followed to its logical conclusion, damages for injuries to an employee in the course of his

employment will be considered an unfair labor practice and must be settled by the Labor Board.

We believe that this court will grant this petition for writ of certiorari to the Court of Appeals and in its decision find that the plaintiffs have stated a cause of action in their amended complaint and reverse with directions for further proceedings in this cause. We believe the Supreme Court will rule that a case should be decided on its merits and not on the pleadings. As was stated by the Court of Appeals for the Seventh Circuit in the case of *Topping* v. *Fry*, 147 F. 2d 715 at Page 719:

> "Litigation is not an art in writing nice pleadings. It can and should seldom be settled on its merits at the pleading stage * * *."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated July 18, 1955.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11378. October Term, 1954, April Session, 1955.

ALICE M. ANSON, ET AL., *Plaintiffs-Appellants*, *vs.* HIRAM WALKER & SONS, INC., *Defendant-Appellee.* } Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

April 29, 1955.

Before FINNEGAN, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Plaintiffs appeal from an order dismissing their suit for breach of contract, in which they sought damages and reinstatement of seniority. According to their amended complaint, they are employed by defendant at its Clark Street plant in Peoria, Illinois. The company owns and operates not only this property, but also one on Edmund Street, and a third, known as the Warehouse plant. The employees at all three places are represented by Distillery Workers' Union, Local No. 55, of Distillery, Rectifying and Wine Workers' International Union of America, but those at each of the three establishments constituted a separate bargaining unit. The Clark Street property was acquired in 1941; in 1943 its employees and defendant agreed that the workers there should have plant seniority from the time when defendant pur-

chased the property. There was to be no interchange of employees between the three operating bargaining units, composed respectively of the three bodies of workmen at the three locations. The collective bargaining contract upon which suit was brought, entered into in May, 1943, was still in effect on July 28, 1954, when the complaint was filed.

It was further charged that in May, 1952, defendant devised a scheme to deprive its Clark Street employees of their seniority and accomplished its purpose by transferring all bottling operations on Clark Street to its Edmund Street plant and by announcing that thereafter all such employees on Clark Street no longer had seniority; that defendant attempted to justify this action on the claim that if the defendant should move the Clark Street bottling employees to the Edmund Street plant, it would thereby violate the contractual provision prohibiting interchange of employees between the three units. Plaintiffs, however, averred that the consolidation of operations was not an interchange of employees as mentioned in the contract, which had been made with the "expectation" of continued existence of all bottling operations and that defendant had refused to recognize "plant job seniority." As a result, plaintiffs said they have been deprived of their employment and have been damaged.

In paragraph 16 plaintiffs averred that they have pursued "every means available to them according to the terms of said contract in regard to negotiation and arbitration concerning the breach of the contract" and that defendant has "ignored their complaints and requests" and has refused to "reinstate them to their seniority status" and "to reimburse them for their losses." Plaintiffs prayed judgment for damages in the amount of $10,000 for each, or, in the alternative, that they be rein-

stated in their seniority rights and that each of them have judgment of $5,000 for loss of wages.

The collective bargaining agreement was made a part of the complaint. Under it the union was recognized as the exclusive bargaining agent for all defendant's employees. There could be no interchange of employees between the three operating bargaining units, and each employee was to have "plant and departmental" seniority. The contract further provided, *inter alia,* that if, as a result of changes in operating methods, the union was of the opinion that inequities had resulted in seniority treatment, the company would give full and careful consideration to such changes as the union might propose The seniority established by the agreement was "plant-wide" as distinguished from "company-wide."

The court sustained a motion to dismiss for these reasons: (1) failure to state a claim upon which relief could be had; (2) the union was an indispensable party; (3) the suit is against public policy in that, if maintained, it would result in superseding and evading the exclusive bargaining rights of the union and in that a voluntary compromise on the part of the defendant would constitute a violation of and interference with the exclusive collective bargaining rights of the union and of Section 8 of the Labor Management Relations Act of 1947; and (4) plaintiffs did not show that they had exhausted their contract remedies. On appeal, plaintiffs contend that the order was erroneous from any and all of the mentioned points of view.

In the Labor Management Relations Act, Title 29, U. S. C. Sec. 151, Congress has declared its purpose to protect the rights of employees to bargain and to safeguard commerce and promote its flow by removing sources of industrial strife and encouraging practices conducive to

friendly adjustment of disputes arising out of differences as to wages, hours, or other working conditions. Obviously Congress hoped to encourage the practice of collective bargaining, by protecting workers' self-organization, and their designation of representatives of their own choosing. It sought to aid and encourage employers and their employees to reach and maintain agreements and to make all reasonable efforts to settle all differences by such methods as might be provided in any applicable agreement for determining and settling labor disputes, grievances, wages, rates of pay and hours of employment. Sec. 152 (5). Grievances are defined as disputes about working conditions and the interpretation and application of particular clauses of the agreement and alleged violations thereof. In other words, Congress has set up machinery looking to the peaceable settlement of all controversies regarding wages, rates of pay, working hours, seniority and grievances as to all matters growing out of employment, and prescribed an exclusive remedy for settlement of all labor disputes. It has attempted to substitute for physical or legal warfare, peaceful negotiation. Thus, a designated union becomes the exclusive bargaining agent of the employees, and its contract with the employer governs the employees' individual hiring contracts.

With this policy in mind, the agreement upon which plaintiffs sue provides for the settlement of grievances in an orderly fashion by presentation to the company by the individual, and, if agreement is not reached, then by negotiation with the union concerning the same. The scheme of the legislation is that employer and employee, bargaining freely, shall abide by the contract and employ only the remedies provided by the Act for any violation thereof. With these general principles in mind we approach the essential elements involved in this appeal.

As we have observed plaintiffs grounded their action on

the collective bargaining agreement, which they averred was entered into for the benefit of plaintiffs and under which, they further averred, each employee may sue directly. Obviously, their rights are to be determined by their agreement. As said in *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, at 336: "The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates." Consequently, the terms of the agreement become part of the individual contracts of employment, not because of the contract of the parties, but because the law says they shall, no matter how the parties may feel about the matter. *Association of Westinghouse* v. *Westinghouse Electric Corp.,* 210 F. 2d 623, at 627 (CA-3), cert. granted 347 U. S. 1010. As we said in *In re Chicago & E. I. Ry. Co.,* 94 F. 2d 296, at 299 (CA-7): "The intention of the parties must be found in the language used to express such intention; and if the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision." Consequently, the rights and remedies of the parties are to be determined from the plain unambiguous words of the contract upon which suit is brought, unattended by averments of other intentions or contemplations. The unequivocal words of the agreement must speak for themselves. Plaintiffs insist, however, that, despite the plain words of the agreement and the statute fixing their remedies, they have a right to maintain this suit for breach of contract.

In *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U. S. 653, where an employee sued his employer who was subject to the Railway Labor Act, for wrongful discharge,

the court held that the plaintiff had a right to maintain the suit, irrespective of the provisions of the Act, provided the law of the state in which the suit was brought permitted such suits without showing compliance with or exhaustion of administrative remedies and, obviously, that whether the state law so provided was to be determined from the law of the state. The court then examined the law of Missouri and determined that under it an employee must exhaust his contractual or administrative remedies before he can sustain an action for a wrongful discharge. Accordingly, having found that the terms of employment was embraced in a complete code for the adjustment of such disputes and that the employee had made no substantial attempt to follow the procedure prescribed for remedy for wrongful discharge, the Court concluded: "The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the *Slocum* case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the *Moore* litigation, *supra*, under Mississippi law. On the other hand, if the applicable local law, as in Missouri requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so." 345 U. S. at pages 361-362.

In Illinois it is well settled that where a member of a union or other association, brings suit and it appears that

his remedies are governed by laws and regulations of the association to which he belongs, he must, before he can succeed, show that he has exhausted all of the remedies provided by those laws and regulations. *Engel* v. *Walsh*, 258 Ill. 98; *Pacaud* v. *Waite*, 218 Ill. 138; *People* v. *Grand Lodge, Knights of Pythias*, 166 Ill. 71; *People* v. *Order of Foresters*, 162 Ill. 78; *Keel* v. *Illinois Terminal Railroad Co.*, 346 Ill. App. 169; *People* v. *Tanaschuk*, 317 Ill. App. 130. This court, in *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997, held that ordinarily a complaint by an employee must show that plaintiff followed the grievance procedure provided for in the collective bargaining agreement. Without such a showing plaintiffs may not resort to the courts for relief. Consequently, under *Transcontinental & Western Air, Inc.* v. *Koppal, supra*, and the Illinois governing law, plaintiffs, even if they sued for wrongful discharge, could not maintain their action unless they showed exhaustion of their remedies under the collective bargaining agreement.

It is to be borne in mind, however, that plaintiffs were not suing for wrongful discharge, but were seeking to enforce the provisions of their collective bargaining contract, which prescribed the remedy for presentation of grievances. Their averment in this respect is that they have pursued "every means available to them according to the terms of said contract in regard to negotiation and arbitration concerning the breach of contract", but that the defendant has ignored "their complaints and requests and has continued to refuse to reinstate them to their seniority status", and "to reimburse them for the losses they have incurred." At most, these are words of dubious meaning. They include no averment that plaintiffs have invoked the provisions for settlement of grievances. On the contrary, they have presented their grievances directly to the court without averring compliance with the contractual provisions or with statutory provisions providing

remedies for grievances. The "complaints and requests" are not defined. We cannot read into them an explicit averment that the employer has refused to entertain the grievances of which plaintiffs now complain. There is no averment that the union negotiated with the employer concerning those grievances as contemplated by the contractor or that the employer refused to negotiate. Yet by the contract the union was the exclusive bargaining agent of plaintiffs. We cannot attribute to the equivocal words of the complaint any connotation or implication that plaintiffs have attempted to exhaust or have exhausted their remedies created by their bargaining agreement for disposing of their grievances.

In that respect the case is distinguished from *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. 2d 997 (CA-7), for there it was averred that the employer had refused to negotiate with regard to the remedies provided by the collective bargaining agreement. Here there is no such averment. This omission, in itself, we think, was fatal, on the specific grounds raised by defendant's motion to dismiss. As pointed out in *Harrison* v. *Pullman Co.*, 68 F. 2d 826 (CA-8), at page 827: "Appellant in terms sues because of an alleged breach of this contract, and, to prevail, he must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. This he has failed to do, and for this reason he is unable to present his case in court as a justiciable controversy."

The amended complaint discloses its own insufficiency. Plaintiffs sue for breach of contract, because they say they have been wrongfully treated under their agreement with the employer. Under that contract they have the right to present grievances. If, at the conclusion of the negotiations, the employer is found to have acted wrongfully, a complaint may follow before the National Labor Relations

Board to establish an unfair labor practice and to determine what reparation, if any, is due them, and in case of dissatisfaction with the Board's decision, review may be had in the United States Court of Appeals. Thus, Congress has designed an exclusive method for the hearing and determination of labor disputes, with appropriate remedies. It has not vested in the District Courts concurring jurisdiction over such matters. *Myers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41; *Sanco Piece Dye Works, Inc.* v. *Herrick*, 33 Fed. Sup. 80. Clearly plaintiffs are attempting to by-pass the remedies created for them by Congress, and thus to circumvent the plain mandate of Congress that jurisdiction in such matters be vested exclusively in the National Labor Relations Board. This we think they may not do. They must avail themselves of the remedies provided by Congress, the adequacy of which can no longer be questioned. *Pratt* v. *Oberman & Co.*, 89 F. 2d 786 (CA-8). It follows, we think, that irrespective of the averments of paragraph 16 of the amended complaint, it is clear that plaintiffs are invoking the jurisdiction of a court without pursuing their remedies under the National Labor Relations Act. To pursue such a course of action, is to do violence to the whole tenor of the Act, and to its declared purposes. It was the legislative intent that the remedies supplied by the Act and by a collective bargaining contract made in pursuance thereof should govern the parties' rights and prevent a hearing in any court, until the provisions of the Act and the contract shall have been complied with. Cf. *Slocum* v. *D. L. & W. R. Co.*, 339 U. S. 239. To entertain the suit would in our opinion violate the public policy enunciated by the Act.

In view of our conclusions, it is unnecessary to consider other points raised by the parties.

The judgment is

AFFIRMED.

APPENDIX B.

Judgment of Court of Appeals.
Entered April 29, 1955.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

APPENDIX C.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.
Tuesday, May 17, 1955.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

AUG 17 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 253

ALICE M. ANSON, ET AL.,
Petitioners,

vs.

HIRAM WALKER & SONS, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHER-WAGNER PRINTING COMPANY, CHICAGO

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

STATEMENT.

Inasmuch as the judgment of the court below must be tested by the allegations of the amended complaint, a more comprehensive statement of its contents is necessary.

One hundred and sixty plaintiffs (R. 2, 3), all employees of Defendant, seek herein to sue upon their separate and individual claims, pursuant to Rule 20(a) of the Federal Rules of Civil Procedure. Each plaintiff alleges $10,000.00 damages, or a total *ad dammum* of $1,600,000.00. (R. 52, 53.)

A motion to dismiss the original complaint was filed. (R. 43, 44.) Arguments thereon were heard, briefs were filed, and the matter taken under advisement by the District Court. (R. 47.) The motion to dismiss was granted, as was leave to file an amended complaint. (R. 48.) Amendment to the original complaint was thereafter filed. (R. 48-53.) Motion to dismiss was ordered to stand as to the amended complaint. (R. 53.) Further argument was had and the matter again taken under advisement. (R. 54.) Motion to dismiss was again allowed and cause dismissed. (R. 54.) No further request to amend the complaint was made.

The only material difference between the original and the amended complaints is the addition of paragraph 16 to the amended complaint. (R. 52.)

Plaintiffs are employees of Defendant at its Clarke Street, Peoria, Illinois, plant. (R. 51.) They were all members of and represented by Distillery Workers Union, Local No. 55 of Distillery, Rectifying and Mineworkers' International Union of America (hereinafter called the "Union"). (R. 49, 50.) Defendant maintained and operated two other plants at Peoria, Illinois: Its Edmund Street plant and its Uptown Warehouse plant. Defendant's other employees at these two plants were likewise represented by the Union. (Par. 7, R. 11.)

Each of Defendant's three Peoria, Illinois, plants constituted a separate bargaining unit. (Pet., p. 3, R. 50.)

A collective bargaining agreement (Pl. Ex. "A", R. 10-40) governed Plaintiffs' conditions of employment. It had been in effect over ten years at the time the suit was filed. (R. 50.) Plaintiffs' case is based upon the provisions of that agreement. (Par. 15 and 16, R. 52.)

A full and detailed grievance procedure is established

by that agreement. (R. 20-23.) Grievances are defined therein as follows:

> "Grievances shall consist only of disputes about working conditions, about the interpretation and application of particular clauses of the agreement and about alleged violations. * * *" (R. 22.)

Seniority of all employees was by plant. (Par. 13, 14, R. 12.) The seniority article of the agreement describes "seniority" as "plant seniority" no less than eleven times. (R. 12-16.) Elsewhere in the agreement the term "plant seniority" is employed no less than eight times. (R. 19, 27, 29, 30.) The words "departmental seniority" for intra-plant administration are used no less than thirteen times. (R. 12-16, 19, 20.) The words "company seniority" are never used in the agreement. Additionally, the agreement enforces and emphasizes the "plant seniority" principle with the separate provision that:

> "There shall be no interchange of employees between the three operating bargaining units mentioned above. * * *" (Par. 8, R. 11.)

Defendant and the Union recognized the possibility of changes in Defendant's future operating methods and specifically provided therefor in the seniority article of the agreement. (Par. 31, R. 16.)

By the agreement the Defendant retained "* * * full authority in the operation of all branches of its business. * * *" (Par. 4, R. 11.)

In May of 1952, Defendant consolidated its Clarke Street plant operations with and into its Edmund Street plant operations. (Pet. 4; Par. 10, R. 51.)

After the consolidation and pursuant to the terms of the collective bargaining agreement, Plaintiffs were offered such work as was available at the Edmund Street plant without seniority. (Par. 10, R. 51.)

II.

ARGUMENT.

(A) Under Illinois Law the Complaint Is Fatally Defective for Failure to Allege Exhaustion of Contract Remedies.

The Judgment below can be rested upon two narrow and local requirements of pleading. The first is that under Illinois law the complaint is fatally defective for failure to allege exhaustion of contract remedies. The second is that the complaint upon its face, showing no contractual breach by Defendant, fails to state a cause of action. This case, therefore, meets none of the tests applied by this Court for the granting of a Writ of Certiorari. (Rule 19, 1(b).)

In Illinois it is settled that the Plaintiffs here were required in their complaint to allege exhaustion of their contract remedies prior to bringing their suit. The application of this Illinois rule of law is the cornerstone of the opinion below. Plaintiffs' Petition is not focused upon this pivotal point. It is addressed primarily to conclusory reasoning of the opinion, unattached to the finding that the complaint is insufficient.

Plaintiffs drew their complaint. They are bound by its allegations. Twice they had unbounded opportunity to allege every fact in the light most favorable to them. One such occasion came after forewarning by the District Court through its original order of dismissal and right to amend.

The complaint shows a clear, full, and complete grievance procedure for resolution of—

> "* * * disputes about working conditions, about the interpretation and application of particular clauses

of the agreement and about alleged violations * * *." (Par. 5, R. 22.)

It shows the final determination of grievances to be with an arbitrator; not with a court. (Par. 58, R. 22.)

Under this Court's holding in *Transcontinental and Western Air, Inc.* v. *Koppal,* 345 U. S. 653, 661, 662; 97 L. Ed. 1325; 73 S. Ct. 906, the law of Illinois determines whether these Plaintiffs must allege exhaustion of their contract remedies prior to suit. Illinois law is settled that members of unions, lodges, churches, trade boards, and other organizations must show that the procedure established for the resolution of controversies has been exhausted before recourse may be had to the courts.

In *Keel* v. *Illinois Terminal Railroad Co.,* 346 Ill. App. 169, 172, the court in considering a case wherein the plaintiff sued the railroad company for a wrongful discharge said at page 172:

> "But if he attempts to maintain that his employment is continuing and insists upon reinstatement, then the grievance procedure, including final disposition by the Railroad Board, is exclusive."

The above holding is particularly applicable here, where the Plaintiffs allege in their complaint "that the plaintiffs are employees of the defendant company * * *." (Par. 16, R. 52.) It is also particularly applicable in the light of the statement made by Plaintiffs at page 9 of their Petition, wherein they say "it is true that nowhere in the complaint is it stated that defendant wrongfully discharged plaintiffs' * * *."

In *Engel* v. *Walsh,* 258 Ill. 98, 105, the Illinois Supreme Court considered a bill for injunction brought by a member of a labor union to restrain its officers from enforcing a fine, and said at page 105:

"Plaintiff in error having failed to set out the by-

laws and regulations of the Union, we do not know whether he has exhausted all of his remedies by appeal, or otherwise, within the union. If there is a by-law permitting the plaintiff in error to appeal to some reviewing body from the decision of the Executive Board, clearly he would have no standing, in any event, in a court of equity until he had exhausted the remedies provided by his Association for the redress of his supposed grievance."

In *Pacaud* v. *Waite*, 218 Ill. 138, 146-148, the Illinois Supreme Court considered an injunction and accounting suit brought by a member of the Board of Trade of Chicago against certain other members thereof. The court said, pages 147-148:

> "It has been frequently held that parties may agree to submit questions to the arbitrament of persons or tribunals other than the regularly organized courts, and that such contracts are valid and will be enforced. * * *"

At page 148:

> "The record before us shows that the complainants are members of the board of trade; that when they joined the association, like all other members, they agreed to abide by and be governed by the rules, regulations and by-laws of the association; that they made the contracts and deposited the margins hereinabove referred to under Section 1 of Rule 20; that Section 6 of Rule 20 provided for a committee to determine to whom the deposit should be paid after the contracts were closed, in case of dispute; that there was a dispute as to whom the margins or a part thereof should be paid; that in lieu of submitting that dispute to a committee as provided by Section 6 of Rule 20, this bill was filed. We are of the opinion that Section 6 of Rule 20 is the valid by-law of said board of trade and that the bill can not be maintained."

In *People* v. *Grand Lodge, Knights of Pythias*, 166 Ill. 71, 76, the Illinois Supreme Court considered a mandamus

case to compel the Grand Order of the Lodge to reinstate a member lodge to all rights held by subordinate lodges, and said, page 76:

> "The Grand Tribunal had jurisdiction to hear and determine the charges against the relator, and its judgment was not void. It is well settled that mandamus will not lie in such a case to reinstate a member, or, as in this case, to reinstate the relator to its previous standing in the order, where the remedy by appeal to a higher tribunal in the order has not been exhausted."

In *People* v. *Order of Foresters,* 162 Ill. 78, 81, the Illinois Supreme Court again reiterated the rule of exhaustion of remedies. That case likewise involved expulsion of a member. The court said at page 81:

> "Therefore, 'when the character, constitution, or bylaws of the Society requires a member to seek redress within the Society, and by appeal to carry the question to its highest tribunal, he has no right to bring an action against the society in a court of the land until he has exhausted his remedy in its tribunals.' It follows that a writ of mandamus will not be awarded where a member of a benefit society, who has been expelled, has a remedy by appeal under the laws of the society, which he has not exercised."

In *People* v. *Tanaschuk,* 317 Ill. App. 130, 146, the court considered a *quo warranto* action to determine defendant's right to exercise a church office. In an 18-page opinion the court reviewed the decisions of the Illinois Supreme Court, and said at page 146:

> "It appears too that the plaintiff had a remedy within the church organization, by appeal to question the proceedings of the Parish meeting on February 1, 1942, and not having exhausted his remedy within the organization he has no standing in a court of law.
>
> "It is a rule of law that where the constitution, bylaws or rules and regulations of a voluntary associa-

> tion provide for appeal to a higher tribunal for the redress of any alleged wrongful conduct or irregularity affecting a member, such member will not be permitted to litigate his grievance in a court of law until he has exhausted his remedy within the organization."

In *Moody* v. *Farrington*, 227 Ill. App. 42, the court considered an action for damages by a member of a union against its officers because of expulsion from the union. The court said at page 42:

> "Appellant's declaration showing affirmatively that appellant had not exhausted his remedies before the tribunals of the order in accordance with the constitution to which he voluntarily subscribed before bringing this suit, the demurrer was properly sustained."

In the case of *United Protective Workers of America* v. *Ford Motor Company*, 194 F. (2) 997, 1001 (C. A. 7), the court said:

> "In seeking to justify the dismissal of the Complaint, Ford insists that the Complaint fails to show that the plaintiffs followed the grievance procedures provided for in the collective bargaining agreement and that without such a showing plaintiffs may not resort to the Courts for relief. *This would ordinarily be true.*" (Emphasis supplied.)

In the *Ford* case, the court held that the allegations were sufficient to show that the plaintiff union member had attempted to utilize the grievance procedure established by the collective bargaining contract and that the Company had refused to do so.

In their original complaint Plaintiffs failed completely to allege any facts showing utilization of the contract grievance procedure. When leave to amend was granted, Plaintiffs knew that they were required to allege either that they had exhausted the grievance procedure or that they had

attempted to do so and Defendant had refused to proceed thereunder. This is evident from the fact that the only substantial difference between the original and amended complaints is the inclusion in the latter of paragraph 16. (R. 52.) Stripped to its essentials, paragraph (16) alleges:

> "That the Plaintiffs * * * have pursued every means available to them according to the terms of said contract in regard to negotiation and arbitration concerning the breach of the contract * * * but the said Defendant Company has ignored their complaints and requests and has continuously refused to reinstate them to their seniority status. * * *"

Plaintiffs argue here that this nebulous allegation is within the ruling of *United Protective Workers of America* v. *Ford Motor Company*, 194 F. (2) 997, 1001. The allegations in the *Ford* case were that the employer:

> "* * * refused Plaintiff Union's request that the grievance procedure provided in said collective bargaining agreement * * * be utilized as a means of attempting a settlement of the wrongful dismissal of plaintiff."
>
> "That the Plaintiffs did, * * * verbally, by numerous letters, telegram and telephone communications and in conferences with various and divers local and Detroit agents, officers and legal representatives of the Ford Motor Company, protest the termination of the services of the plaintiff, Orloski, and did further urge that the grievance procedure, in said agreement provided for, be resorted to * * *." (p. 1001.)

There is an unbridgeable gulf between the *Ford* case allegations and those of the Plaintiffs. Plaintiffs do not allege that they presented a grievance according to the grievance procedure set up in the contract. Plaintiffs do not allege that the Union in their behalf attempted to do so, despite the mandatory requirement of the grievance procedure (Par. 52, R. 21) that it do so in writing. No mention

is made of a "grievance", "grievance procedure", or of the "written report of the grievance", the latter of which is also required by the contract. Instead, Plaintiffs have carefully elected to say that they "have pursued every means available to them" under the contract "in regard to negotiation and arbitration concerning the breach of the contract."

The next clause of the averment is that Defendant "* * * has ignored their complaints and requests * * *". These "complaints and requests" are not called grievances nor are they defined either as to substance, form, or the time of presentation. Such resilient wording does not meet the requirement of Rule 8(e)(1), Federal Rules of Civil Procedure, that "averments of a pleading * * * shall be simple, concise, and direct."

Both the District Court and the Court of Appeals have held on three occasions that Plaintiffs did not allege exhaustion of their contract remedies and such uniform holdings, it is submitted, are correct.

(B) The Complaint Fails to State a Cause of Action Because It Shows No Contractual Breach by Defendant.

There emerges from the obscure and confusing allegations of the complaint (Par. 13, R. 51) the claim that Defendant misinterpreted and misapplied the seniority provisions of the collective bargaining agreement. On page 4 of their Petition we find this difficult statement of their contention:

> "Plaintiffs state that consolidation of employees would not be an interchange of employees within the meaning of the contract but that consolidation of operations without consolidation of employees was in violation of the contract, and plaintiffs thereby lost their seniority which the contract was designed and intended to protect."

The factual background obtained from the complaint and its Exhibit "A" reveals that Defendant owned and operated three plants at Peoria, Illinois: Its Edmund Street plant, its Clarke Street plant, and its Uptown Warehouse plant. (R. 49, 50.) Plaintiffs were employees of its Clarke Street plant. (R. 51.) In May of 1952 Defendant consolidated and combined the operation of its Clarke Street and Edmund Street plants into one plant; namely, its Edmund Street plant. (R. 51.) It then announced that, in compliance with the provisions of its collective bargaining agreement, its Clarke Street employees, if they desired to do such work as was available at the Edmund Street plant, could not carry their Clarke Street plant seniority to the Edmund Street plant and would work as new employees. (R. 51.)

That the Defendant had the right to so consolidate and combine its plant and operations is not disputed.

At page 3 of their Petition Plaintiffs say that this suit is "for breach of contract * * * previously negotiated by the union." Plaintiffs are bound by their collective bargaining agreement. It had governed their employment for more than ten years. (R. 50.) They incorporated it as Exhibit "A" in their complaint. (R. 10-40.) They could not escape its terms if they would. It is a part of their contract of employment. In *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332, 336; 64 S. Ct. 576; 88 L. Ed. 762, 767, this court said of the effect of a labor contract:

> "The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates."

In *Association of Westinghouse* v. *Westinghouse El Corp.*, 210 F. (2) 623, 627 (C. A. 3, Jan. 19, 1954), the court said:

> "The terms of the collective bargaining contract

thus became part of the individual contract of employment, not because of consensual acts of the employer and employee, but because the law says so no matter how these parties may feel about the matter. * * *"

Turning to their contract, it is nowhere alleged to be ambiguous, incomplete, or fraudulent. Defendant was required to enforce its provisions as written. *In re Chicago and E. I. Railway Co.*, 94 F. (2) 296, 299 (C. A. 7, Feb. 1938), the court said:

"The intention of the parties must be found in the language used to express such intention; and if the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision. * * *"

The contract provisions involved herein are those defining seniority (Sec. V, R. 12); the bargaining units (Sec. II, R. 11); and the grievance procedure. (Sec. VIII, R. 20.) In light of the location of the three separate plants at Peoria, Illinois, the reasons for providing strict "plant seniority" become apparent. The employees of each plant desired that their seniority be not violated by an employee from another plant. Each group of plant employees insisted upon protection against "bumping" by employees from another plant. In order to accomplish this result, plain and incisive language was agreed upon by the Union and Defendant. It was not enough that the Seniority section (R. 12-16) repeatedly provides and refers to "plant seniority". The parties additionally contracted that:

"There shall be no interchange of employees between the three operating bargaining units mentioned above. * * *" (Par. 8, R. 11.)

When the Defendant consolidated its operations to its Edmund Street plant, it was, by the very contract upon which Plaintiffs rely, clearly prohibited from transferring the plaintiffs with their seniority there. To have done so

would have been to distort "plant seniority" into "company seniority". It would create the inequitable result of these Plaintiffs having "bumped" from their jobs their fellow Edmund Street plant employees with less seniority.

Additionally, to have done as Plaintiffs contend would have violated the express provision against the interchange of employees between the three plant bargaining units.

These contractual commitments are dispatched with remarkable ease in a single sentence of Plaintiffs' Petition. At page 7 they say:

> "* * * Defendant breached the collective bargaining agreement by depriving them of seniority *through the process of consolidation of operations without consolidation of employees; and that such action upon the part of the defendant is not an interchange of employees within the meaning of the contract.* * * *" (Emphasis supplied.)

The above inference that Defendant was required to "consolidate employees" when it "consolidated operations" lacks so much as a suspicion of contractual or legal support. Moreover, it is disposed of completely by the contract provision that Defendant "shall have full authority in the operation of all branches of its business * * *," except as limited therein. (R. 11.)

The barren statement (Pet., p. 7) that Defendant would not have violated the "interchange of employees" provision of the agreement had it employed Plaintiffs with their seniority at the Edmund Street plant, we submit, is dissolved by the simple query: Had Defendant consolidated its operations into the Clarke Street plant, would Plaintiffs, who are Clarke Street plant employees, then argue as they do here concerning the seniority rights of Edmund Street plant employees? Their self-interest would compel them to reverse the position they take here.

The complaint on its face shows that Defendant did not breach its agreement. On the contrary, it shows that it enforced it as written. The complaint, therefore, does not state a cause of action.

(C) The Judgment Below Being Correct, Certiorari Should Not Issue to Correct Possible Errors of Reasoning by the Court Below.

The judgment of the courts below resulted from a construction of the complaint as an insufficient pleading under Illinois law.

Plaintiffs, in their Petition, focus their attack on the last paragraph of the opinion. It is contended that therein the principles are enunciated that an employee under no circumstances may bring suit against his employer for violation of a collective bargaining agreement, and that his remedy in such instance is exclusively before the National Labor Relations Board in an unfair labor practice proceeding. If such be the import of the opinion, candor compels us to say that it is not immune from criticism.

However, the correct approach to judicial opinions has been stated by this Court in *Armour and Company* v. *Wantock,* 323 U. S. 126, 132, 133, 89 L. Ed. 118, 123, as follows:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the fact of the case under discussion."

The facts here are that the seniority rights of all employees of the Defendant are affected by Plaintiffs' precipitous litigation. All Defendant's employees are represented by the Union as their exclusive collective bargaining agent. This Union is not made a party to this suit. The Plaintiffs have not presented their claims as grievances to

the Defendant. The Union, as the exclusive collective bargaining agent of Plaintiffs, has not presented these claims as grievances to the Defendant. The rights of the exclusive collective bargaining agent to administer and enforce the seniority provisions of its collective bargaining agreement on behalf of all employees will be effectively foreclosed if Plaintiffs are permitted to pursue litigation rather than contractual arbitration under the grievance procedure.

It is the public policy of the United States, as expressed in the Labor Management Relations Act, 1947, to encourage "the friendly adjustment of * * * differences as to wages, hours, or other working conditions." (29 U. S. C. A., Sec. 151.)

The Act further reiterates the public policy to be in aid of employers *and the representatives of employees* to settle their differences "* * * by such methods as may be provided for in any applicable agreement for the settlement of disputes." (29 U. S. C. A., Sec. 171(b).)

The Act further provides that a Union selected by a majority of the employees "* * * shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining. * * *" (29 U. S. C. A., Sec. 159(a).)

The Act then defines collective bargaining as "* * * the negotiation of an agreement, or any question arising thereunder. * * *" (29 U. S. C. A., Sec. 158(d).

For either the employer or the Union to refuse to bargain collectively with the other is then declared to be an unfair labor practice. (29 U. S. C. A., Sec. 158(a)-(5); Sec. 158(b)-(3).)

With this factual and statutory background, it is apparent that in this action, from which is absent any allegation of the use of the grievance procedure, the Plaintiffs, if

successful, will have foreclosed both the Defendant and their exclusive bargaining agent from utilizing that which the Congress of the United States has said will promote industrial peace; namely, "• • • such methods as may be provided for in any applicable agreement for the settlement of disputes." (29 U. S. C. A., Sec. 171(b).) It is also apparent that this action discourages rather than encourages "• • • practices fundamental to the friendly adjustment of industrial disputes arising out of • • • differences as to wages, hours, or other working conditions. • • •" (29 U. S. C. A., Sec. 151.) It is also apparent that this action defeats the right of the absent Union to function as "• • • the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining. • • •" (29 U. S. C. A., Sec. 159(a).)

Moreover, the National Labor Relations Board in *United States Automatic Corporation* (N. L. R. B., 1944), 57 N. L. R. B. 124, 133, has interpreted the decisions of this Court as proscribing conduct which seeks to bypass the Union as an exclusive bargaining representative of employees. At page 133 the Board says:

> "To disregard the agent selected by the majority as the bargaining representative of the whole unit and negotiate with certain employees individually, interferes with the rights of the majority of the employees to bargain through its representative, violates the essential principles of collective bargaining, and subverts the processes established by the Act. *These are well established principles which recently have been re-emphasized by the United States Supreme Court.*" (Emphasis supplied.)

The 1947 Amendment to the Act granting to individual employees the right to present grievances to their employer is of no importance in this case because here there is no allegation that Plaintiffs presented any grievance to the Defendant.

In *Douds* v. *Local 1250, Retail, Wholesale Department Store Union of America (CIO)*, 173 F. (2) 764, decided after the passage of the Labor Management Relations Act of 1947, the court in dealing with a case involving the handling of grievances, said of the powers of the Union at page 769:

> "On the other hand, any bargain they may make is subject to his power to cancel it, for in so doing he acts for them as their agent, as much as though they had expressly authorized him to do so. His power to represent all within the 'unit' *is absolute and beyond question;* but it does not automatically exclude them." (Emphasis supplied.)

Irrespective then of how erroneously or imperfectly the lower court expressed its reasoning, the above considerations were those which formed the foundation for its concluding statement that—

> "To entertain the suit would in our opinion violate the public policy enunciated by the Act."

Additional analysis of Plaintiffs' contentions raises these pertinent questions:

If it were the intention of the court to hold that this suit could not be brought under any circumstances, why did the court devote and direct three pages of its opinion to the proposition that an allegation of exhaustion of contract remedies under Illinois law was essential *before suit could be brought?*

Why also did the court say (App. A., Pet., 19):

> "Consequently, under *Transcontinental & Western Air, Inc.* v. *Koppal, supra,* and the Illinois governing law, plaintiffs, even if they sued for wrongful discharge, could not maintain their action *unless they showed exhaustion of their remedies under the collective bargaining agreement."* (Emphasis supplied.)

In *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U. S. 653, this Court recognized the right to sue under appropriate allegations pursuant to local law.

A further difficulty with Plaintiffs' contentions arises from the court's reliance upon and recognition of its own decision in *United Protective Workers of America* v. *Ford Motor Co.,* 194 F. (2) 997, *wherein it recognized and granted the right of the employee to sue.* Additionally, the court recognizes and relies upon the case of *Harrison* v. *Pullman Company,* 68 F. (2) 826, wherein the Court of Appeals for the Eighth Circuit recognized the right to sue upon proper allegations.

III.

CONCLUSION.

Plaintiffs by the use of devious and sophisticated language have attempted to evade the making of an extremely simple, yet essential allegation, which apparently they can neither truthfully allege nor judicially establish. That pivotal allegation under Illinois law is that they have exhausted their contract remedies prior to bringing this action.

If permitted, this action will relegate to a state of impotency the collective bargaining rights of the exclusive collective bargaining agent for Plaintiffs, which rights have been uniformly enunciated and protected by numerous decisions of this Court.

It would result in depositing in the United States District Court one hundred and sixty separate and distinct law suits, each with major factual distinguishing characteristics. Rule 20(a) of the Federal Rules of Civil Procedure, pursuant to which this case is brought, provides that distinct and several relief may be granted to each plaintiff

"according to their respective rights to relief." If the Plaintiffs are entitled to damages, the amount of such damage would necessarily differ as to each individual plaintiff. Some have worked longer than others; some have worked for different employers; different rates of pay would be in effect as to different plaintiffs; and some plaintiffs may have had no employment whatever. The obligation of each plaintiff to minimize damages and the right of the Defendant to have damages minimized would make all of these factors material in determining the respective rights of each plaintiff. It was this type of employer-employee litigation which the grievance procedure of a collective bargaining contract was and is designed to eliminate. In *Association of Westinghouse* v. *Westinghouse El. Corp.* ..... U. S. ....., 99 L. Ed. 368, this Court said, page 380:

> "* * * the ultimately desirable social policy is to make it a matter of industrial habit to rely for a remedy for such grievances not on stoppage of work *or on law suits but on the grievance procedure within an industry.*" (Emphasis supplied.)

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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